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No. 01-1229

Supreme Court, U.S.
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In The

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

AMICUS BRIEF OF THE STATE OF LOUISIANA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD P. IEYOUB
Attorney General
JOHN C. YOUNG*
JAMES R. DAWSON
Assistant Attorneys General
626 N. 4th Street, Fifth Floor
Baton Rouge, Louisiana 70804-9095
(225) 342-8717

and

LAWRENCE A. DURANT
General Counsel, State of Louisiana, Department of Transportation and Development
P. O. Box 94245
1201 Capitol Access Road
Baton Rouge, LA 70804-9245
(225) 379-1207

**Counsel of Record for Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

This amicus brief is filed on behalf of the State of Louisiana and submitted by its Attorney General, Richard P. Ieyoub. Under Rule 37(4) consent of the parties and leave of this Honorable Court for this filing is not required.

The Supreme Court of the State of Washington has declared a federal statute (23 U.S.C. § 409) unconstitutional. This statute is a procedural rule that provides that records and reports that have been collected and compiled as part of the voluntary participation in federal highway safety improvement programs cannot be either discovered or ultimately used in any manner in any suit for damages.

In pursuit of a lawsuit for damages, the plaintiffs had sought in pre-trial discovery materials and data relating to the accident history for the intersection where their accident occurred. Pierce County interposed § 409 in opposition to the release of the requested accident history and associated data within the context of this tort action.

On an eventual appeal, the Washington State Supreme Court ordered the production, holding that § 409 was unconstitutional.

This brief is submitted in support of the petitioner, Pierce County, and the State of Louisiana asks that this Honorable Court grant the writ application and reverse the decision of the Washington State Supreme Court.

Louisiana, like the State of Washington, receives substantial sums under these various federal highway safety improvement programs. To participate in these voluntary

programs, it collects, compiles, and utilizes a significant amount of information, including the types of data and records sought to be discovered by the plaintiffs in this case.

To facilitate candid evaluation and highway safety improvement planning, Congress implemented § 409, creating a discovery and evidentiary bar in tort litigation and thereby choosing to preempt state and federal discovery and evidentiary rules to the contrary that would otherwise allow either the discovery of the material sought by the plaintiffs in this case or its use for any purpose in a suit for damages.

Louisiana is one of the few states whose courts have addressed the constitutionality of this federal statute. Its courts have found the statute to be a permissible preemption of its state discovery and evidentiary rules as Congress has a relevant and valid interest reasonably related to a specific worthwhile national program.

Louisiana recognizes that this preemption is in the exercise of the worthy goal of Congress to improve the safety of this nation's highways.

SUMMARY OF THE ARGUMENT

In the Petition for Writ of Certiorari filed by Pierce County and in the Amicus Curiae Brief filed by the Attorney General of the State of Washington in support of Pierce County's application, valid reasons are presented why this Honorable Court should review the decision of the Washington State Supreme Court.

The State of Louisiana suggests that there are other equally valid reasons why this Honorable Court should grant the writ request and reverse the decision of the Washington State Supreme Court that allowed the discovery of various records and reports that had been collected and compiled as part of a voluntary participation in federal highway safety improvement programs.

First, one of the major considerations for the granting of a writ of certiorari is present as the determination by the Washington State Supreme Court that there is no valid federal interest in Congress preempting state court discovery and evidentiary rules, and that § 409 is therefore unconstitutional, is in conflict with the decisions of the supreme courts of other states and of a federal district court for Louisiana.

The decision of the Washington State Supreme Court also questions whether Congress has the constitutional right to create national highway safety improvement programs and to then condition the voluntary participation in those programs on the acceptance of terms that might conflict with state procedural and evidentiary rules but which terms are in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program, i.e., the safety improvement of the highways of this nation.

As an additional reason for the grant of this writ request, § 409 is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort. If the decision of the Washington State Supreme Court is allowed to stand, the validity of

those statutes would become at issue, attacking the legitimacy of Congress to determine terms and inducements to effectuate the implementation of its programs.

Further, the interpretation of this statute is an important federa question that has not been previously addressed by this Honorable Court and is necessary for the continued proper application of the various federal highway safety improvement programs. The failure to grant this writ request and to thus allow the erroneous decision of the Washington State Supreme Court allowing this discovery to become cloaked with apparent authority will seriously impact those highway safety programs.

ARGUMENT

1. **The determination by the Washington State Supreme Court that there is no valid federal interest in Congress preempting state court discovery and evidentiary rules, and that § 409 is therefore unconstitutional, is in conflict with the decisions of the supreme courts of other states and of a federal district court**

Rule 10 of this Honorable Court sets forth considerations for the review on a writ of certiorari.

One significant consideration is where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort.

By determining that there is no relevant and valid federal interest reasonably related to a specific worthwhile national program, the Washington State Supreme Court reached a decision in direct conflict with contrary determinations by three other state supreme courts.

In *Claspill v. Missouri Pacific R. Co.*, 793 S.W.2d 139, 141 (Mo. 1990), *cert. denied*, 498 U.S. 984 (1990), the Missouri State Supreme Court held that in creating § 409 Congress was acting in constitutional concert with the Commerce Clause (U.S. Const., art. I, § 8, cl. 3). Citing *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 554 (1985) and *South Carolina v. Baker*, 485 U.S. 505 (1988), the Missouri court noted that the state courts were not to create "judicially defined spheres of unregulable state activity." To give § 409 effect was, therefore, not in contravention of the Tenth Amendment of the United States Constitution.

A similar constitutional challenge was rejected by the Mississippi State Supreme Court in *Sawyer v. Illinois Cent. Gulf R. Co.*, 606 So.2d 1069 (Miss. 1992). In finding no basis for a constitutional rejection of § 409, that court noted:

> "[N]obody made Mississippi get into the railroad crossing safety enhancement program. It is a voluntary program. Duly authorized officials of this state, however, have committed us to the program – in exchange for ninety percent federal funding – and it does not strike us outrageous that we should accede to the federal government's rules and regulations appertaining thereto. We have it on good authority that Missouri and Louisiana have rejected challenges to Section 409. See *Claspill v. Missouri Pacific*

Railroad Co., 793 S.W.2d 139 (Mo. 1990); *Martinolich v. Southern Pacific Transportation Co.*, 532 So.2d 435 (La. Ct.App. 1988). We accept Section 409 as controlling, as well." *at* 1074.

As indicated in *Sawyer, supra*, Louisiana courts have also addressed whether the application of § 409 would be unconstitutional.

In *Wiedeman v. Dixie Elec. Membership Corp.*, 627 So.2d 170 (La. Nov. 29, 1993), *cert. denied, Louisiana Dept. of Transp. and Development v. Wiedeman*, 511 U.S. 1127 (1994), the Louisiana State Supreme Court noted, that despite the State's substantial interest in the application of its discovery and evidentiary rules:

> "§ 409's explicit preemptive language overrides conflicting state law by virtue of the Supremacy Clause. U.S. Const. art. VI, cl. 2; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, 613 (1977). Section 409 controls. *Beecher v. Keel*, 607 So.2d 549 (La.1992). See also *Claspill v. Missouri Pacific Railroad Company*, 793 S.W.2d 139, 140 (Mo. banc 1990)." *at* 172.

In *Reichert v. State, Dept. of Transp. and Development*, 96-1419, p. 7 (La. 5/20/97), 694 So.2d 193, 199, the Louisiana State Supreme Court again noted that "the extent to which certain documents are discoverable or admissible is clearly a procedural right." However, the plaintiff was "not deprived of a constitutionally vested right when deprived of the evaluations and recommendations of the DOTD."

Additionally, a Louisiana State Court of Appeal decision, *Martinolich v. Southern Pacific Transp. Co.*, 532 So.2d

435 (La.App. 1 Cir. 1988), *writ denied*, 535 So.2d 745 (La. 1989), *cert. denied, Louisiana Dept. of Transp. and Development v. Nick Martinolich, Inc.*, 490 U.S. 1109 (1989), has been frequently cited by the courts of other states as authority for the holding that the limitation on the admission of certain items under § 409 may be intrusive, but:

> "[T]he intrusion, in this instance, however, is constitutionally permissible because Louisiana's participation in the federal funding scheme is voluntary; because the improvement of state highways with federal funds is in pursuit of '[providing] for the general welfare' as provided in U.S.Const. Art. I, § 8, cl. 1 ('spending power'); because it is clear that participation in the funding program requires acquiescence to the intrusion; and, finally, because the intrusion is related to a valid federal interest (inasmuch as 23 U.S.C. § 409 encourages participation in a scheme that ensures, by prioritization, deliberative spending of federal funds). *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 2796, 97 L.Ed.2d 171 (1987)." *at* 438.

More recently, another Louisiana state appellate court, *Palacios v. Louisiana and Delta R.R., Inc.*, 2000-00971 (La.App. 3 Cir. 12/29/00), 775 So.2d 698, *writ denied*, 2001-0565 (La. 5/4/01), 791 So.2d 653, held that § 409 was constitutional under the Supremacy Clause, citing *Martinolich, supra*.

That court further noted that a federal court for Louisiana, *Gaubert v. Denton*, 1999 WL 350103 (E.D.La. May 28, 1999), *affirmed by*, 210 F.3d 368 (5th Cir. (La.) Feb. 17, 2000), had also found that § 409 violated neither

procedural due process nor the right of access to the courts.

In *Gaubert, supra,* the federal district court commented that "every court that has considered the privilege, both federal and state, has concluded that it serves the legitimate purpose of fostering the collection and evaluation of highway safety information free from the threat of future tort actions" and rejected the challenges to § 409 under the First, Fifth, Tenth, and Fourteenth Amendments to the United States Constitution.

The federal district court in *Gaubert, supra,* in applying the holding of *Tennessee Electric Power Co. v. Tennessee Valley Authority,* 306 U.S. 118 (1939), to the facts at hand, found that the plaintiff lacked standing to bring his Tenth Amendment challenge.

It is noted that in this case the Washington State Supreme Court also held, that as to the requested accident history and associated data, prohibiting discovery under § 409 was in constitutional contravention to that state's Public Disclosure Act.

While no other state supreme court appears to have addressed the issue as to whether a state's public records act could be used to circumvent § 409 within the framework of a suit for damages, a Tennessee state appellate court rejected a Tenth Amendment challenge to the supremacy of § 409 and found that § 409 did constitutionally bar the discovery of a location's accident history despite that state's Public Records Act. See *Seaton v. Johnson,* 898 S.W.2d 232, 236 (Tenn.Ct.App. Jan. 27, 1995), *appeal denied,* (May 01, 1995): "It would be an anomaly for this Court to deny access to the State's copy of its report

to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government."

Nothing in § 409 takes public information about accidents and converts it to private, secret information. The analysis can be, and often is, publicized widely. However, this analysis, and the material gathered to formulate that analysis, just cannot then be subject to discovery within the context of this suit for damages *or* otherwise used in a courtroom to obtain a money judgment for damages, whether against a state, municipal government, or private entity. See, i.e., *Robertson v. Union Pacific R. Co.,* 954 F.2d 1433 (8th Cir. 1992), excluding from evidence under § 409 a newspaper article reporting the highway department's analysis and ranking of a railroad crossing.

As such, the decision of the Washington State Supreme Court is in direct conflict with the decisions of the supreme courts of other states, reasoned decisions of lower state courts, and a federal district court. That justifies the granting of writs in this case.

2. Congress has the constitutional right to create national highway safety improvement programs and to condition the voluntary participation in those programs on the acceptance of the terms of a contractual agreement that are in furtherance of a relevant and valid interest reasonably related to a specific worthwhile national program

This Honorable Court has long recognized, that pursuant to Congress' power to legislate under the Spending Clause (U.S. Const. Art. I, § 8, cl. 1), Congress may fix the

terms on which it may disburse federal money to the states. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

Legislation enacted pursuant to the spending power is in the nature of a contract. *Pennhurst, supra* at 17. In return for federal funds, the states agree to comply with the conditions that Congress has attached to its offer. *Pennhurst, supra* at 17; *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

A prospective recipient state is free to decline a grant of federal funding. *New York v. United States*, 505 U.S. 144, 168 (1992). Also see *Martinolich, supra* at 438: "Louisiana's participation in the federal funding scheme is voluntary."

Similarly, a current recipient may withdraw from a federal program and decline further funding if it so chooses. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1399, (11th Cir.(Ga.) Aug. 21, 1997), *reversed on other grounds, Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983).

The freedom of recipients to decline a grant of federal funding ensures that they will remain responsive to the preferences of their local constituents. *New York v. U.S., supra* at 168.

Valid conditions imposed with federal funding bear a relationship to the purpose of the federal spending. *New York v. U.S., supra* at 168, citing *South Dakota v. Dole, supra* at 207-208.

While any number of federal highway safety programs are available to the states and to local governments, the one most applicable in the instant case is the Hazard Elimination Program (23 U.S.C. § 152).[1]

The Code of Federal Regulations implementing § 152 and other federal highway safety programs require that the states comply with those conditions to receive federal-aid funds. 23 C.F.R. §§ 1.1, 1.9; *People of State of Cal. ex rel. Dept. of Transp. v. U.S.*, 27 Fed.Cl. 130 (Fed.Cl. Oct. 30, 1992): "This regulation, in mandatory terms, prohibits federal fund participation in any cost incurred in violation of federal or state law, the regulations set forth in the C.F.R., or as prescribed by policies and procedures of the Administrator of FHWA."

One condition imposed in order to secure the federal funds is that the states report to the Secretary of Transportation on a yearly basis the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of those improvements. Each state report *shall* contain, among other things, "the *previous* and subsequent *accident experience* at these locations." (§ 152(g)). This report *shall* also contain "the *previous* and subsequent *accident experience* at improved locations." (§ 152(g)).

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[1] Pierce County had identified this intersection as especially hazardous and applied for federal hazard elimination funds under § 152. That application was denied. The County then reapplied on April 3, 1996, and on July 26, 1996, three weeks after this fatal accident, the application was granted. See, decision of Washington State Supreme Court, *Guillen v. Pierce County*, 31 P.3d 628, 633 (Wash. Sep. 13, 2001).

In addition to the reporting requirements, analysis of locations for planning potential improvement and evaluating those proposed measures require that the states collect and compile accident histories at those locations.[2]

This obligation to conduct and systematically maintain an engineering survey is for *all* public roads, not just those that may be part of a state highway system (§ 152(a)(1)), as funds authorized to carry out the hazard elimination program are available for expenditure on *any* public road (§ 152(c)(1)).[3]

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[2] See, i.e., 23 CFR § 924.9 Planning (Highway Safety Improvement Program).

> "(a) The planning component of the highway safety improvement program shall incorporate:
>
> "(2) A process for analyzing available data to identify highway locations, sections and elements determined to be hazardous on the basis of *accident experience* or accident potential."

See, also, 23 CFR § 924.13 Evaluation (Highway Safety Improvement Program)

> "(a) The evaluation component of the highway safety improvement program in each State shall include a process for determining the effect that highway safety improvement projects have in reducing the number and severity of accidents and potential accidents, including:
>
> "(2) *A record of accident experience before* and after the implementation of a highway safety improvement project."

[3] In addition to the local projects authorized under § 152, numerous highway safety improvement programs also address the additional ability of local governments to apply for federal funding of local projects for hazard elimination on their roads and bridges, see, i.e., 23 U.S.C. § 133 (Surface Transportation Program). These additional hazard elimination projects, and the availability of federal funding, are also conditioned on the analysis of justifying data to affect a proper prioritization in the expenditure of both federal and local funds and are often under the administration of the states.

The trade-off for these requirements that such accident experience be compiled, collected, and utilized to plan and evaluate safety improvements and then that those evaluations be systematically reported to the Secretary of Transportation is the protection afforded by § 409 that the enforced compilation and collection of such data not then be subject to either discovery (as at issue in this case) or otherwise used in a tort action (which is, of course, the ultimate result of the Washington State Supreme Court's decision).

It is submitted that a possible way to view the requirements of Congress in § 409 is to view it the way this Honorable Court did in upholding the constitutionality of the Driver's Privacy Protection Act in *Reno v. Condon*, 528 U.S. 141, (2000):

> "Like the statute at issue in *Baker*, the DPPA does not require the States in their sovereign capacity to regulate their own citizens. *The DPPA regulates the States as the owners of data bases.* It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*."[4] *at* 151 (*emphasis supplied*)

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[4] *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

3. The federal statute (§ 409) is but one of several federal statutes that impose exact or similar discovery and evidentiary restrictions in suits in tort, and if the decision of the Washington State Supreme Court is allowed to stand, the validity of those statutes would become at issue, attacking the legitimacy of Congress to determine terms to effectuate the implementation of its programs

The provision of § 409 that the "reports, surveys, schedules, lists, or data compiled or collected" pursuant to a highway safety improvement program "shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages" is not unique. Several other federal statutes or regulations contain similar restrictions on either the discovery or evidentiary use of such material or reports compiled or collected pursuant to federal requirements.[5]

This Honorable Court has held such a restrictive statute to be constitutional. See *Baldrige v. Shapiro*, 455

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[5] See, i.e., 13 U.S.C. § 9(a) (census reports); 10 U.S.C. § 1102(b) and 14 U.S.C. § 645(b) (medical quality assurance records created by or for the Department of Defense); 21 U.S.C. § 360i(b)(3) (medical device user facility reports); 15 U.S.C. § 2055 (consumer product safety reports); 20 USCA § 9007(b)(1) (national educational statistical reports); 33 U.S.C. § 930(c) (injury reports for longshore and harbor workers' compensation); 49 U.S.C. § 504(f) (motor carrier accident reports); 49 U.S.C. § 1154(a)(5)(b) (discovery and use of cockpit and surface vehicle recordings and transcripts); 49 U.S.C. § 20703(c) (locomotive accident reports); 49 U.S.C. § 20903 (railroad carrier accident and incident reports); and 49 U.S.C. § 47507 (nonadmissibility of noise exposure map and related information as evidence).

U.S. 345 (1982), upholding 13 U.S.C. § 9(a) which provides: "Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding."

Of specific import is a similar discovery and evidentiary restriction established by 23 U.S.C. § 402, the implementing statute for Congress' highway safety programs. This statute requires that each state "*shall* have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths."

Further, § 402 provides that state programs:

> " . . . *shall* include, but not be limited to, provisions for an *effective record system of accidents* (including injuries and deaths resulting therefrom), *accident investigations* to determine the probable causes of accidents, injuries, and deaths, . . . highway design and maintenance (including lighting, markings, and surface treatment), traffic control, . . . surveillance of traffic for detection and correction of high or potentially high accident locations . . . " (*emphasis supplied*)

Again, as part of the trade-off for being required to collect and compile such information as part of the federal program to improve highway safety, a provision restricting the discovery and use of that information identical to § 409 is provided by § 402(k)(1):

> "Notwithstanding any other provision of law, if a report, list, schedule, or survey is *prepared by*

> *or for a State or political subdivision thereof* under this subsection, such report, list, schedule, or survey shall not be admitted as evidence or used in any suit or action for damages arising out of any matter mentioned in such report, list, schedule, or survey." (*emphasis supplied*)

This statute has not been the subject of much litigation but was found to be constitutional by the federal Eastern District of Louisiana court in *Gaubert v. Denton, supra*.

As this Honorable Court has noted, when Congress has intended materials and reports not to be subject to compulsory process, it has said so. See, i.e., *St. Regis Paper Co. v. U.S.*, 368 U.S. 208, 219 (1961).

Congress has said so about the material sought to be discovered by the plaintiffs in this tort suit. As with the similar statutes, this explicit expression of Congress' intent should be enforced by this Honorable Court by granting the writ request and reversing the decision of the Washington State Supreme Court.

4. The interpretation of this statute is an important federal question that has not been previously addressed by this Honorable Court and is necessary for the continued proper application of the various federal highway safety improvement programs

The State of Louisiana joins in the request of its fellow *amici* and argues that the intervention of this Court is necessary to resolve the conflict between the Washington State Supreme Court and other courts that have considered the same issue. As pointed out above and by the

other *amici*, all of the courts which have considered the constitutionality of § 409 and its restrictions on discovery and evidentiary use in a suit for damages have upheld its constitutionality and several courts have also determined that § 409 specifically pre-empts state discovery and evidentiary rules under the Supremacy Clause. However, many states have not addressed this issue and there are no federal appellate decisions on the subject.

The interpretation of this federal statute has not been subject to the previous review of this Honorable Court. Absent such review, the lower courts have interpreted the statute in an inconsistent and often conflicting manner and have failed to recognize and enforce congressional intent.

The failure of this Honorable Court to grant this writ on this important federal issue will leave the interpretation of a declaration of Congress to the various states, some of which will declare it unconstitutional *de jure* as has the State of Washington, others of which will render it unconstitutional *de facto* by continuing to either ignore its application or circumvent congressional intent.

The granting of this writ for this reason alone is proper.

CONCLUSION

The petition by Pierce County for a writ of certiorari should be granted to resolve the conflict between the Washington State Supreme Court and the state Supreme Courts of Missouri, Mississippi, and Louisiana, to enforce the power of Congress afforded it by the Constitution, to prevent a disparate interpretation of similar federal statutes, and to provide guidance to the other courts of this country on an important federal question.

Respectfully submitted,

RICHARD P. IEYOUB
Attorney General
JOHN C. YOUNG*
JAMES R. DAWSON
Assistant Attorneys General
626 N. 4th Street, Fifth Floor
Baton Rouge, Louisiana 70804-9095
(225) 342-8717

and

LAWRENCE A. DURANT
General Counsel, State of Louisiana, Department of Transportation and Development
P. O. Box 94245
1201 Capitol Access Road
Baton Rouge, LA 70804-9245
(225) 379-1207

**Counsel of Record for Amicus Curiae*